

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.
NORTHERN DISTRICT

SUPERIOR COURT

Gabriel Bilc

v.

New Hampshire Real Estate Commission

RECEIVED

AUG 02 2013

NH REAL ESTATE COMMISSION


Docket No. 216-2012-CV-00354

ORDER

The New Hampshire Supreme Court on June 27, 2013 vacated and remanded the above-captioned matter. As directed by the New Hampshire Supreme Court, this Court VACATES the New Hampshire Real Estate Commission's decision disciplining the petitioner.

SO ORDERED.

Date: July 15, 2013



Kenneth C. Brown
Presiding Justice

**THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
SUPERIOR COURT**

Hillsborough Superior Court Northern District
300 Chestnut Street
Manchester NH 03101

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July 16, 2013

**GABRIEL BILC
240 VALLEY ST #1
MANCHESTER NH 03103**

RECEIVED

AUG 02 2013

NH REAL ESTATE COMMISSION

Case Name: **Gabriel Bilc v. New Hampshire Real Estate Commission**
Case Number: **216-2012-CV-00354**

You are hereby notified that on July 15, 2013, the following order was entered in the above matter

re: APPEAL OF DECISION OF NH REAL ESTATE COMMISSION

(see copy of order attached hereto)

(Brown, J.)

John M. Safford
Clerk of Court

(537)

C: Elyse S. Alkalay, ESQ

THE STATE OF NEW HAMPSHIRE

SUPREME COURT

In Case No. 2012-0741, Gabriel Bilc v. New Hampshire Real Estate Commission, the court on June 27, 2013, issued the following order:

Having considered the petitioner's brief, the memorandum of law filed by the respondent, the New Hampshire Real Estate Commission (Commission), the parties' supplemental memoranda filed in response to our order of April 12, 2013, and the record submitted on appeal, we conclude that oral argument is unnecessary in this case. See Sup. Ct. R. 18(1). We conclude that the Commission lacked jurisdiction over this case. Accordingly, we vacate the trial court's order and remand.

In Robinson v. N.H. Real Estate Comm'n, 157 N.H. 729, 732-33 (2008), we held that, pursuant to the exemption in RSA 331-A:4, I (2004), the Commission lacks jurisdiction over a complaint alleging violations of RSA chapter 331-A in the attempted sale of a property by the property's owner. In so holding, we rejected the Commission's argument that the exemption did not apply because the property owner had "held himself out to be a real estate broker in the transaction." Effective August 21, 2009, the legislature amended RSA 331-A:4, I, to limit the exemption so as to apply only to the extent that the property owner "does not hold himself or herself out as a real estate broker." Laws 2009, 125:1.

There is no dispute in this case that the petitioner owned the property at issue, and that his attempted sale of it occurred in 2008, prior to the effective date of the 2009 amendment. Nor is there any dispute that the petitioner held himself out as a real estate broker in the 2008 transaction. On April 12, 2013, we ordered the Commission to file a memorandum of law addressing whether it had jurisdiction over the complaint in light of Robinson. In its response, the Commission does not attempt to distinguish Robinson or otherwise argue that it had jurisdiction under the provisions of RSA chapter 331-A in effect at the time of the 2008 transaction. Instead, it argues that the legislature intended the 2009 amendment to apply retroactively, and that retroactive application of the amendment does not violate Part I Article 23 of the New Hampshire Constitution.

Part I, Article 23 of the New Hampshire Constitution provides:
 "Retrospective laws are highly injurious, oppressive, and unjust. No such laws, therefore, should be made, either for the decision of civil causes, or the punishment of offenses." "Retrospective laws" include "every statute which takes away or impairs vested rights, acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to

transactions or considerations already past.” In the Matter of Goldman & Elliott, 151 N.H. 770, 772 (2005) (quotation omitted). In determining whether a statute violates Part I, Article 23, we first consider whether the legislature intended the law to apply retroactively. State v. Fournier, 158 N.H. 214, 218 (2009). If the legislature intended the law to apply retroactively, we then consider whether retroactive application of the statute is constitutionally permissible. Id.

In this case, the legislature expressly provided that the 2009 amendment would take effect sixty days after its passage, or August 21, 2009, see Laws 2009, 125:7, and nothing in the statute indicates any intent to apply it retroactively, compare id. at 219 (finding legislative intent to apply statute retroactively where statute specifically stated that it “applie[d] retroactively”), with Goldman, 151 N.H. at 772 (finding legislative intent to preclude trial court from issuing new orders addressing issue after effective date of statute where statute barring such orders provided that it would take effect upon its passage). When a statute is silent concerning whether it applies prospectively or retroactively, we generally presume that the statute will apply prospectively only when it affects substantive rights. Billewicz v. Ransmeier, 161 N.H. 145, 152 (2010). This presumption is reversed, however, if the statute is remedial or affects only procedural rights. Id.

The Commission argues that the 2009 amendment is remedial because the legislature intended that it correct a defect in RSA 331-A:4, I, and because RSA chapter 331-A promotes justice and advances the public welfare. See In the Matter of Kenick & Bailey, 156 N.H. 356, 359 (2007) (defining a remedial statute as one designed to remedy a defect in existing law); Appeal of Franklin Lodge of Elks, 151 N.H. 565, 568 (2004) (stating that the purpose of remedial legislation is to promote justice and advance public welfare). We have long cautioned, however, against the formulaic distinction between substantive rights and remedies, noting “the difficulty of drawing that distinction so accurately as not to impair the force of the constitutional prohibition” against retrospective laws. Goldman, 151 N.H. at 773 (quoting Kent v. Gray, 53 N.H. 576, 579 (1873)). Thus, we have observed that, “while the demarcation between substantive rights and liabilities and procedures and remedies provides a helpful guidepost, ultimately, we must discern the nature of the rights affected by the new act to assess whether its application to a particular matter offends the constitution.” Goldman, 151 N.H. at 773 (quotation, brackets, and citation omitted).

The practical effect of applying the 2009 amendment retroactively is to subject sellers of property, like the petitioner, to the imposition of discipline, including fines, for transactions that were exempt from RSA chapter 331-A and, thus, could not have violated the statute when they were completed. See RSA 331-A:26, :28 (2011 & Supp. 2012). We note that the Commission did not require the petitioner to pay the \$2,000 fine to the purchasers in the underlying transaction, but to the Commission itself. Cf. Mortgage Specialists v. Davey, 153

N.H. 764, 791 (2006) (finding that fines imposed by trial court for contempt were punitive, and not remedial, where they were to be paid to the court and not to the party harmed by the contempt). Indeed, the Commission noted that the original complainants “withdre[w] their complaint based on the resolution of their monetary dispute with” the petitioner.

We find that, by subjecting the petitioner to discipline for a transaction that, at the time he entered into it, was exempt from RSA chapter 331-A, retroactive application of the 2009 amendment affects the petitioner’s substantive rights. See Cagan’s, Inc. v. Dep’t of Rev. Admin., 126 N.H. 239, 249-50 (1985) (finding that applying an amendment to an exemption from a vending machine sales tax so as to subject certain sales to the tax that were exempt at the time they were made violated Part I, Article 23). Accordingly, we conclude that the amendment applies prospectively only, and that the Commission lacked jurisdiction over the complaint in this case. We vacate the trial court’s order, and direct the trial court upon remand to vacate the Commission’s decision. See RSA 331-A:28, III.

Vacated and remanded.

Dalianis, C.J., and Hicks, Conboy, Lynn and Bassett, JJ., concurred.

**Eileen Fox,
Clerk**

Distribution:

Hillsborough County Superior Court North, 216-2012-CV-00354
Hon. Kenneth C. Brown
Hon. Tina L. Nadeau
Mr. Gabriel Bilc
Frank C. Fredericks, Esq.
Timothy A. Gudas, Supreme Court
Allison R. Cook, Supreme Court
File

NEW HAMPSHIRE REAL ESTATE COMMISSION
ORDER
FILE NO. 2010-016

NEW HAMPSHIRE REAL ESTATE COMMISSION
V
GABRIEL BILC

This matter comes before the Real Estate Commission on the complaint of the New Hampshire Real Estate Commission through its Investigator Ann Flanagan, alleging violations of NH RSA 331-A:26, IV; RSA 331-A:26, V; RSA 331-A:26, VII; RSA 331-A:26, XXIX; and RSA 331-A:26, XXXVI, by Gabriel Bilc. The Real Estate Commission after notice and hearing in the above captioned matter makes the following findings of fact:

1. Gabriel Bilc (hereinafter referred to as Respondent) was licensed as a New Hampshire real estate salesperson on 10/3/98 and as a real estate broker on 2/6/03 and was so licensed and the principal broker of Bilc Enterprises LLC at the time of the alleged violations.
2. The NH Real Estate Commission directed its investigator to initiate a parallel complaint based on the Complaint File No. 2010-016, Keith & Emily White v Gabriel Bilc (Commission Meeting Minutes, June 21, 2011).
3. Complainants Keith & Emily White requested to withdraw their complaint based on the resolution of their monetary dispute with Respondent and the Commission accepted the Complainants' request for withdrawal at the June 21, 2011 Commission meeting.
4. Complainants were renting a property owned by Respondent and entered into a Purchase and Sales Agreement and Deposit Receipt ("P&S") to purchase the

property from Respondent with a \$21,000 deposit to be held in Respondent's personal account, and there was an Addendum agreeing to allow Respondent to use the deposit "for his own interests at anytime he desires".

5. Complainants were denied financing and wanted their deposit returned.
6. Respondent testified that he did not return the buyers' deposit because they failed to provide proof that they had made application for financing pursuant to the Purchase and Sales Agreement and Deposit Receipt, and that the buyers notified Respondent that they were going to be purchasing another property instead.
7. Respondent testified that if the property did not appraise at the selling price then he would have lowered the price to accommodate the buyers' lender.
8. Respondent's bond insurance paid the buyers \$21,000.
9. Respondent testified that he is in a dispute with the bond company for paying the claim without contacting him for specific information.

Based on the foregoing findings of fact, the Commission hereby issues the following rulings of law:

There was no proof provided that Respondent entered into the P&S agreement with the buyers intending to not return the buyers' deposit if they were denied financing, and Respondent as the seller had a right to pursue remedies in civil court regarding the provisions of the contract. Therefore, the Commission rules that Respondent did not violate RSA 331-A:26, IV; RSA 331-A:26, V; or RSA 331-A:26, VII.

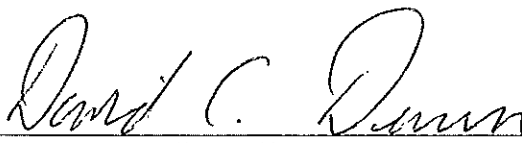
Respondent was both the seller and the listing agent in a transaction with unrepresented buyers, and the Commission feels that Respondent was dishonorable,

unethical, and incompetent because Respondent did not recommend to the buyers to consult with an attorney before entering into a purchase and sales agreement with a sizeable deposit being held other than in escrow. Therefore, the Commission rules that Respondent did violate RSA 331-A:26, XXIX and RSA 331-A:26, XXXVI.

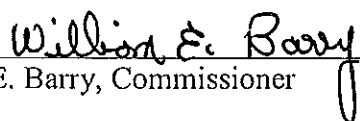
In view of the foregoing rulings of law, the Real Estate Commission hereby orders that Respondent pay a disciplinary fine in the amount of one-thousand dollars per offense totaling two-thousand dollars (\$2,000) to the New Hampshire Real Estate Commission, payable to the Treasurer State of New Hampshire, within thirty (30) days of the effective date of this Order. Failure to comply with this disciplinary Order will result in the suspension of Respondent's real estate license until the fine is paid. The Commission's hearing panel consisted of four commissioners and the above decision was rendered with the approval of Commissioners David C. Dunn, William E. Barry, and Paul A. Lipnick; Commissioner Daniel S. Jones was opposed to the decision of the majority.

Under the provisions of RSA 331-A:28, III, this disciplinary action is subject to appeal in the Superior Court. The Respondent has thirty (30) days from the date of this Order in which to file an appeal. Such an appeal will suspend the Commission's disciplinary action pending resolution of the appeal. If this decision is not appealed within thirty (30) days, this Order will become final.

Commissioner James R. Therrien evaluated this case and did not take part in the hearing or decision.



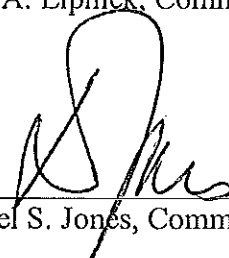
David C. Dunn, Presiding Officer 3/20/2012
DATE



William E. Barry, Commissioner 3/20/2012
DATE



Paul A. Lipnick, Commissioner 3/20/2012
DATE



Daniel S. Jones, Commissioner (opposed to the decision of the majority) 3/20/2012
DATE